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SUPREME COURT, U.S.

NO. 80-6692

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ORIGINAL COPY

WILLIAM DURWOOD BUSBEE,

Appellant,

VS.

THE STATE OF TEXAS,

Appellee.

ON APPEAL FROM
THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS OR AFFIRM

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Appellant William Durwood Busbee hereby files this Brief Opposing Appellee's Motion to Dismiss or Affirm, and

would show the Court that Appellee has failed to raise any proper ground on which such a dismissal or affirmance can or should be based.

1.

This Is A Direct Appeal, Not A Petition for Writ of Certiorari

Appellee's first ground for dismissal is that Appellant's appeal is not timely. In reaching this conclusion, Appellee has misconstrued the nature of this proceeding and also the statutes involved.

This case is a direct appeal brought by Appellant from a decision of the Texas Court of Criminal Appeals upholding the validity of a Texas statute, Article 42.12, Section 3 (d), of the Texas Code of Criminal Procedure. This Texas Court of Criminal Appeals is the highest Court of the State of Texas, insofar as criminal cases are concerned. Appellant brings this appeal pursuant to 28 U. S. C., Section 1257 (2), authorizing such a direct appeal.

Appellee would apparently have this Court construe this cause not as a direct appeal, but as a Petition for Writ of Certiorari pursuant to 28 U. S. C., Section 1257 (3). In fact, Appellant's circumstances would allow him to either file a direct appeal, or a Petition for Writ of Certiorari, as by this cause he is seeking review of decision by Texas' highest criminal court upholding the validity of a state statute claimed to be invalid as being repugnant to the Constitution of the United States. See Cyclopedia of Federal Procedure, Section 57.140 and Section 60.138.

Appellant made clear in his jurisdictional statement that he was pursuing a direct appeal to this Court, and

not seeking certiorari. Appellee has admitted, in its Motion, that notice of appeal was given within the 90 day period provided in Rule 11.1 of this Court. Appellant submits that for these reasons, Appellee's Motion to Dismiss for Lack of Jurisdiction should be denied.

2.

There Was No Adequate Non-Federal Ground for The Decision of the State Court

Appellee requests this Court to dismiss this appeal, or affirm the Judgment of the Texas Court of Criminal Appeals, because the Judgment has an adequate state ground. We submit that this is at best circular and peculiar logic.

The Court below plainly and clearly held that Appellant's appeal must be dismissed because the state "statute makes clear there is no appeal from such determination." (Opinion of the Court of Criminal Appeals, Page 2) The Court went on to state that no notice of appeal was timely filed by Appellant, and for that reason, the appeal should be dismissed. Appellant believes, first, that the record in this case belies the logic of the Court below in stating notice of appeal was not timely filed, and, more importantly, that it is as an independent state ground for the decision, when Appellant attacks the state statute as being unconstitutional, based on its express wording.

Appellant believes that the record will show that he was sentenced on September 1, 1978, and himself filed a pro se and handwritten notice of appeal, dated September 13, 1978, with the Court. That notice was apparently filed on September 14, 1978. Appellant's present attorney was appointed by the Trial Court to pursue whatever appellate

rights he might have, by Order dated September 13, 1978, filed September 14, 1978. Appellant's attorney learned of his appointment some time following September 14, 1978. Appellant's attorney never had a chance to consult with Appellant prior to a hearing, as Appellant was transported from the Midland County Jail to the Texas Department of Corrections on September 14, 1978.

Without then having consulted with Appellant, his attorney filed a Motion with the Trial Court, asking that Appellant be returned to Midland County and that a hearing be held to determine whether or not the Trial Court should give effect to the late filed pro se notice of appeal and permit Appellant to appeal the Trial Court's proceeding to adjudicate his guilt.

By Order dated October 4, 1978, the Trial Court set that Motion for hearing on October 20, 1978, at 2:00 o'clock P. M., and directed that Appellant be returned to the Midland County Jail so that he could attend that hearing. On October 5, 1978, prior to Appellant's return to Midland County, and prior to the holding of any hearing whatsoever, the Trial Court, on its own motion, decided that good cause for permitting the requested late giving of notice of appeal had been shown, and the Trial Court did then "grant Defendant leave to file as of September 14, 1978, the Defendant's handwritten and pro se 'notice of appeal and for setting of appeal bond.'"

Appellant believes that it is only by the most tortured reasoning that the Texas Court of Criminal Appeals refused to treat this Order as precisely what it says it is, an Order granting an out-of-time appeal. Beyond that, Appellant fails to understand how the Texas Court of Criminal Appeals found that to be material to its decision.

Appellant's primary contention in the Texas Court of Criminal Appeals and in this Court is that the statute he has been sentenced under violates the Constitution of the United States because it expressly denies him a right to appeal a decision to proceed to adjudicate his guilt, while others similarly situated are expressly afforded such an appeal. The Texas Court plainly and clearly held that the statute expressly provided that no appeal could be taken. To then go forward and say "But if" the statute had provided an appeal, notice was not properly given - or the Court thinks you will lose on merits - or the case has no merit - does not in any way detract from Appellant's main point, that the statute is unconstitutional.

Appellant submits that the Judgment below says "the statute provides for no appeal, but even if it did, your appeal should be dismissed." Appellee would have the Court fix on the "even if it did" language, and dismiss this appeal. The "even if it did" language neither adds to nor subtracts from the Court's plain Judgment, that the statute provides for no appeal, which is precisely Appellant's complaint in that Court and this Court. The fact that <u>if</u> the statute had provided for an appeal, Appellant may have failed to follow certain steps, does not change one whit the fact that denial of the appeal by express statutory wording, and express judicial holdings, denies Appellant the equal protection of the law to which he is entitled. Appellant's Motion should not be granted on this ground.

3.

<u>Appellant Most Certainly Presents A Substantial Federal Question</u>

Appellee states on Page 7 of the Motion, "it must be pointed out that Appellant has the right to appeal from

his adjudication of guilt as would any person subject to the various types of probation enumerated in Article 42.12, V. A. C. C. P." What Appellee is alluding to is that after the Trial Court has revoked probation and adjudicated guilt, an appeal from the original plea of guilty may be taken, if the Trial Court gives permission. This is most clearly not an appeal from the decision to revoke probation and adjudicate guilt. The statute offers Appellant no protections whatsoever against abuse of discretion in the revoking of his probation and adjudication of his guilt, while others, similarly situated, are afforded those protections.

By statute, Texas grants all probationers, other than those whose adjudication of guilt has been deferred, the absolute right to appeal a revocation of their probation. Just as expressly, by statute, Texas denies Appellant, and others, the right to appeal the Trial Court's determination to proceed to adjudicate guilt and revoke his probation. Not only does Appellant have the same protected liberty interests as other probationers, he has an additional interest: the right to maintain a clear record, free of an adjudication of guilt. These are significant interests, significant to Appellant, and, we submit, to the administration of justice. We submit that these are substantial federal questions.

CONCLUSION

Appellant submits that Appellee has shown no grounds whatsoever to dismiss this appeal or affirm the Judgment below. This appeal is properly before this Court, rests on no independent state grounds having any bearing on the constitutional validity of the statute involved, and

presents substantial federal questions. Appellant respectfully asks that this Court declare the statute unconstitutional and remand this case to the Trial Court for proceedings under the original indictment, as if none of the intervening proceedings, including Appellant's plea of guilt, had taken place.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on the 10 day of November, 1981, a copy of the foregoing Brief Opposing Appellee's Motion to Dismiss or Affirm was mailed, postage prepaid, to each of the following, the attorneys representing Appellee:

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in care of David Joers, Esquire, Assistant District Attorney, Midland County Courthouse, Midland, Texas 79701.

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